

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLOS ALVAREZ CHICAS, ALONSO VILLATORO,
MISAELO ALEXANDER MARTINEZ CASTRO, ANGEL
MARTINEZ, EDWIN ULLOA MOREIRA and MATEO
UMAÑA individually and on behalf of all others similarly
situated,

**Case No. 21-cv-09014
(PAE)(SDA)**

Plaintiffs,

- against -

KELCO CONSTRUCTION, INC., KELCO
LANDSCAPING, INC., E.L.M. GENERAL
CONSTRUCTION CORP. D/B/A KELLY'S CREW, JOHN
KELLY and JOSEPH PROVENZANO,

Defendants.

**DECLARATION OF STEVEN JOHN MOSER IN SUPPORT OF MOTION FOR
CONDITIONAL CERTIFICATION AND NOTICE UNDER THE FLSA**

I, Steven Jon Moser, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I represent the Plaintiffs in this action.
2. The Plaintiffs served a subpoena upon ADP in February 2022. In response to the subpoena ADP produced documents, including Earning Statements (“paystubs”) and duplicate checks for employees of Kelco Construction, Inc. (“Kelco”) and ELM General Construction Corp. (“ELM”) for the period from June 23, 2019 until May 14, 2022.

Kelco and ELM Paychecks Shared the Same Account Number and Bear the Same Signature

3. A true and accurate example of a Kelco paycheck obtained from ADP is annexed hereto as Exhibit 1.
4. A true and accurate example of an ELM paycheck is annexed hereto as Exhibit 2.

5. The signatures on both the Kelco and ELM paychecks appear to be identical, and the paychecks bear the same account number – 528309300. All other paychecks produced by ADP for Kelco and ELM for the period from June 23, 2019 until May 14, 2022 share this signature and account number.

6. Aside from the shared ADP account, and shared offices, there are other indicators that Kelco controlled ELM. Defendants “admit that Joseph Provenzano had the authority to hire and fire ELM’s employees.” See Answer (ECF No. 23, ¶ 54), a copy of which is annexed hereto as Exhibit 5 . According to the Kelco Construction website, a printout of which is annexed hereto as Exhibit 6, “Joe Provenzano is a co-founder of Kelco and is the Executive Operations Manager responsible for all field operations.” *See https://kelcoland.com/person/joe-provanzano/*(last visited 12/21/2022).

Employees (Other than Drivers) Received Paychecks from Both Kelco and ELM Covering the Same Workweek. The hours Were Not Aggregated and the Proper Overtime Rate Was Not Paid

7. Based upon a review of the ADP payroll records, there are at least 50 individuals (other than drivers) who were paid by both Kelco and ELM for work performed during the same workweek. The hours were not aggregated for the purposes of computing overtime, and overtime was not paid at 1 ½ times the regular rate of pay.

8. Although the last name has been redacted on Exhibits 1 and 2, they both for the same individual and cover the same workweek. According to these documents Kelco paid this individual for 40 hours at a rate of \$43.48 per hour and ELM also paid this individual for 8 hours at a rate of \$30 per hour. No drive time bonus was paid to this employee.

9. For example, annexed hereto as Exhibits 3 and 4 are paystubs for Alonso Villatoro from Kelco and ELM, respectively, for the workweek ending July 27, 2019. According to these paystubs, Kelco paid Alonso Villatoro for 32 hours at \$46.85 and ELM also paid Alonso

Villatoro for 21 hours at \$15 per hour. As can be seen from exhibits 3 and 4, the signature on ELM and Kelco paychecks is the same, and the account number (528309300) is also the same. No drive time bonus was paid to Alonso Villatoro for this workweek.

ELM Employed other Similarly Situated Laborers

10. Based upon a review of the ADP records, ELM employed over 130 laborers between June 23, 2019 until May 14, 2022.

Other Similarly Situated Kelco and ELM Employees Were Paid a Drive Time Bonus by ELM

11. Based upon a review of the ADP records, Kelco did not pay any employee a “drive time” bonus for transporting Kelco employees to and from worksites. On the other hand, there were at least 75 Kelco and/or ELM employees who were paid a “drive time” bonus by ELM for the period from June 23, 2019 until May 14, 2022.

12. For example, annexed hereto as Exhibits 7 and 8 are paystubs from Kelco and ELM (respectively) for Carlos Alvarez Chicas (Mr. Alvarez) for the workweek ending August 8, 2020. During this workweek Kelco paid Mr. Alvarez for 40 hours at a rate of \$46.85 per hour and one hour of overtime at a rate of \$70.275 per hour. For this workweek Kelco (through ELM), paid Mr. Alvarez a drive time bonus of \$60.00.

13. For example, annexed hereto as Exhibit 9 is a paystub for the week ending March 21, 2021 for Angel Martinez Castro. According to this paystub, he was paid \$22.00 per hour for 36 hours, \$30 per hour for 4 hours, \$33.00 per hour for ten hours, and a drive time bonus of \$60.00.

14. For example, annexed hereto as Exhibit 10 is a paystub for another ELM driver, Junior [last name redacted] for the workweek ending March 27, 2021. According to this

paystub, this individual was paid for 40 hours at \$22 per hour, 10 hours at \$33.00 per hour, and received a drive time bonus of \$360.00.

Conclusion

15. As there are other employees of Kelco and ELM who were subject to the defendants' policies which resulted in the failure to pay for all overtime hours worked at the proper overtime rate, Plaintiffs respectfully request leave to give notice of this action to such other individuals who may be similarly situated.

I declare under penalty of perjury, that the foregoing is true and correct.

Dated: December 23, 2022

/s/ Steven John Moser
Steven John Moser